INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	14
Conclusion	19

CITATIONS

Cases:	
Bronson v. *Schulten*, 104 U. S. 410	18
Hysler v. *Florida*, 315 U. S. 411	18
Tinkoff v. *United States*, 86 F. 2d 868, certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715	2
Tinkoff v. *United States*, 129 F. 2d 21	3, 17
Miscellaneous:	
Federal Rules of Civil Procedure (28 U. S. C. following 723c): Rule 27	14

704583—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 178

PAYSOFF TINKOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 80–81) is reported at 153 F. 2d 106.

JURISDICTION

The judgment of the circuit court of appeals was rendered December 4, 1945 (R. 82), and a petition for rehearing was denied February 15, 1946 (R. 82–83). On May 15, 1946, an order was signed by Mr. Justice Murphy extending the time within which to file a petition for a writ of certiorari to June 14, 1946. A petition for a writ of certiorari was filed June 12, 1946. The

jurisdiction of this Court is apparently invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In our view, the only questions necessary to be considered are whether the district court erred in refusing to issue subpoenas *duces tecum* directed to the Attorney General and the United States Attorney for the Northern District of Illinois and to order the perpetuation of their testimony, and also in refusing to appoint an impartial physician to examine a prospective witness.

STATEMENT

On July 30, 1934, petitioner was convicted in the District Court for the Northern District of Illinois of attempting to prevent the collection of income taxes for the year 1928 due from one William J. Newman and two companies controlled by him, and he was sentenced to imprisonment for 18 months. On October 16, 1936, the judgment of conviction was affirmed. (*Tinkoff* v. *United States,* 86 F. 2d 868 (C. C. A. 7), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715.)

Some time in 1942, his prison sentence having been meanwhile fully served, petitioner filed in the Circuit Court of Appeals for the Seventh Circuit a motion for leave to file in the district court in which he was convicted a petition for a

writ of error in the nature of a writ of error *coram nobis* and a petition to vacate, set aside, and expunge the judgment of conviction of July 30, 1934. The former petition alleged that he was convicted on perjured testimony as a result of a conspiracy, knowledge of which did not come to him until July 30, 1934, the date of the conviction, between the prosecuting authorities and his co-defendant, Newman, who pleaded guilty and offered perjurious testimony on behalf of the prosecution in consideration of an agreement that he (Newman) would receive a light sentence. On July 7, 1942, the circuit court of appeals denied the motion for leave to file the petitions on the ground that petitioner had failed to state a *prima facie* case for the relief sought, for the reasons that the names of the persons referred to as the prosecuting authorities were not stated, no supporting affidavits were presented, and no disclosure made as to how or by whom he expected to prove his allegations. The court further stated that "Moreover, appellant satisfied the judgment by serving the term of imprisonment thereby imposed. Whether this would, as a matter of law, preclude the allowance of the motion, we need not decide. The fact, however, is a circumstance which we may properly take into consideration." (*Tinkoff* v. *United States*, 129 F. 2d 21.)

On November 16, 1942, petitioner filed in the

district court in which he was convicted a petition to perpetuate the testimony of certain named persons, including Newman and one Thomas F. Gayer, Newman's auditor. In it petitioner alleged that he feared that the testimony of the named witnesses would be lost by their deaths, failing memories, or removal from the jurisdiction. (R.[1] 2–8.) The purpose of the petition was to procure evidence within the knowledge of the named witnesses which would tend to substantiate the allegations made in the earlier petition for a writ of error *coram nobis* of the alleged conspiracy between the prosecuting officials and Newman, and thus to cure defects which the circuit court of appeals found in that petition when it denied leave to file it in the district court (see Pet. 2, 13). The petition was granted, and it was ordered that petitioner be permitted to take the depositions of the persons named (R. 10–11). On November 20, 1942, subpoenas *duces tecum,* directing these persons to produce various designated records alleged to be material to the inquiry before a court-appointed commissioner for examination by petitioner, were granted[2] (R. 14–19).

Gayer did not appear in response to the sub-

[1] The letter "R" is used herein to refer to the certified typewritten transcript of record on file in the office of the Clerk of this Court.

[2] Thereafter, numerous additional applications for subpoenas and subpoenas *duces tecum* addressed to other witnesses were granted (R. 20–31).

poenas due to severe illness, as attested by his personal physician, Robert E. Johannesen, who sent to the commissioner a letter, received November 25, 1942, certifying that Gayer had suffered, five weeks previously, a severe attack of coronary heart disease and that it would be dangerous to his health and life to have him appear as a witness in any controversial matter for the next six or eight weeks (R. 21, 23). On December 17, 1942, petitioner received a letter from Dr. Johannesen, which he filed in court as an exhibit, stating that four weeks after Gayer's heart attack, a blood clot was dislodged from his heart and entered his lung, causing serious illness from which he was convalescing, but which left him seriously weakened and ill, and that it was his (Johannesen's) belief that Gayer's life should not be further jeopardized by having either to testify in court or make a deposition in his home (R. 27, 29).

On January 25, 1943, petitioner requested a rule to show cause why Gayer and Newman should not be held in contempt for failure to comply with the subpoenas addressed to them. The motion for the rule alleged, in respect of Gayer, that petitioner, on December 18, 1942, and January 9, 1943, had sent letters to Dr. Johannesen inquiring as to the earliest possible date on which Gayer would be able to make a deposition, but that to date he had received no reply; that on January

15, 1943, petitioner had met Gayer in the city hall of Chicago, where Gayer was employed as a clerk in the Municipal Court; that he had told Gayer he was still awaiting a reply to his letters to Dr. Johannesen, and that Gayer told him that he would discuss the matter with his doctor and advise petitioner as to the earliest date on which he could undergo examination, but that Gayer had to date failed to communicate with petitioner. In respect of Newman, the motion alleged that Newman had failed to answer the subpoenas directed to him; that on December 9, 1942, his attorney had advised the commissioner that Newman was in a hospital under a doctor's treatment and that a certificate to that effect would be forwarded; but that no such certificate had to date been received. (R. 32–34.) The motion was granted, and a hearing on the rule to show cause was set for February 1, 1943 (R. 37), but the record does not disclose what, if any, further proceedings were had or what disposition was made of the rule.

On February 15, 1943, petitioner prayed for an order appointing an impartial physician to examine Gayer for the purpose of determining whether he was able to testify without endangering his life (R. 40–42). This request, apparently, was denied (see R. 55).

On June 18, 1943, petitioner moved "that a rule be entered by this Court directing the United

States District Attorney for this District, and the Attorney General of the United States to show cause why an order should not be entered directing that a Subpoena Duces Tecum be issued for said officials to produce any and all documents and statements, sworn or unsworn, made by William J. Newman, Nora Newman, Thomas F. Gayer, and Abe Salitsky, relating to the Income Tax Liability of William J. Newman and William J. Newman Company for the years 1926 to 1929 inclusive, and said statements being made prior to June 1934; and further to show cause why the said officials' testimony should not be perpetuated by said Paysoff Tinkoff, to support his petition to vacate the criminal conviction in June 1934, on the ground that a conspiracy existed between the said prosecuting officials and William J. Newman and others to bring about the illegal conviction by false and perjured testimony, and further by said public officials' suppressing testimony to show the innocence of said Paysoff Tinkoff of the charges aforementioned, same constituting a fraud upon the Court." As grounds for the motion, it was alleged that "a conspiracy existed between said William J. Newman; his sister, Nora S. Newman, his secretary; Thomas F. Gayer, his auditor; Abe Salitsky, his partner; and others, with the prosecuting officials to wit: the United States District Attorney for this District, and the United States Attorney General, to bring about

704583—46——2

the illegal conviction of Paysoff Tinkoff, the Income Tax Accountant for said William J. Newman, by having said William J. Newman and the others mentioned above testify falsely against your petitioner, all parties, including the prosecuting officials, knowing that said testimony to be given, and which was given, at the trial of your petitioner, was false and fictitious"; that Newman, Nora Newman, Gayer, and Salitsky were "promised with immunity from criminal prosecution"; and that Newman "was promised to get off with a light fine and no prison sentence." It was further alleged that "the said prosecuting officials—the United States District Attorney and the Attorney General of the United States—at all times knew that said Paysoff Tinkoff was absolutely innocent of any wrong regarding the Income Tax Liability of William J. Newman and his company, in that said William J. Newman, Nora Newman, and Thomas F. Gayer had several times testified before said prosecuting officials that said Paysoff Tinkoff; [sic] and that at one of the conferences at the Office of the Attorney General of the United States prior to the Trial in 1934 of your Petitioner, the said William J. Newman had again testified under oath that said Paysoff Tinkoff was absolutely innocent of the charge of assisting William J. Newman to evade his taxes and that of his Company, and that the said assistant Attorney Gen-

eral of the United States [sic] did then and there state to William J. Newman, in substance, as follows:

> We don't want you Mr. Newman, we want Mr. Tinkoff. We are out to get him. If you won't help us and put the blame on Mr. Tinkoff, we will go hard on you. Now think that over, and talk it over with your counsel, and come back and let us know."

It was further alleged that "the said prosecuting officials withheld and suppressed evidence in their possession which would show the absolute innocence of Paysoff Tinkoff"; that "the said testimony, false in all its parts, was carefully rehearsed by said William J. Newman and the others with the prosecuting officials"; that Newman paid his accountants and attorneys to assist the United States Attorney in prosecuting petitioner "so as to build up false testimony to illegally convict said Paysoff Tinkoff, and perpetrate a fraud upon the Court"; that Newman had died shortly prior to the filing of the motion and that petitioner was "unable to obtain a copy of the statements made by said William J. Newman to the prosecuting officials aforementioned"; that "all of the said statements of William J. Newman, Nora Newman, Thomas F. Gayer and Abe Salitsky have been previously demanded by your Petitioner for examination,

and same have been repeatedly refused"; that "all said statements, sworn and unsworn, your Petitioner alleges, on information and belief, which he believes to be true, have at all times and still are in the possession of the prosecuting officials"; that "an examination of the said statements and a copy of the same under the oath of the said prosecuting officials is absolutely necessary to support the allegations [of] your Petitioner's petition to vacate, of fraud and conspiracy"; and that due to the death of Newman, petitioner was "unable to obtain this evidence from any other source, other than the prosecuting officials aforementioned." (R. 47–51.) On October 23, 1944, the motion was denied (R. 62–63).

On December 11, 1944, petitioner again moved for an order appointing an impartial physician to examine Gayer. The motion alleged that an order had been entered in June 1943 excusing Gayer from being examined by petitioner on the ground that such an examination would dangerously impair his health, but that subsequently Gayer had continued to perform his duties as a clerk of the Municipal Court of Chicago and, in petitioner's opinion, was able, without danger to his health, to be subjected to examination. (R. 54 (a)–56.)

On December 18, 1944, Gayer filed in court a sworn affidavit stating that he was 71 years of age and employed in the clerk's office of the

Municipal Court of Chicago; that his regular hours of employment were from 9 A. M. to 5 P. M., but that he was allowed to report in the morning at his convenience, so as to be able to avoid the crowds on the streetcars and obtain a seat, due to the condition of his health; that for the same reason he was permitted to leave in the afternoon at any time he felt it necessary; that since his last heart attack in May 1944 he was absent from work until August 1, 1944; that since August 1, 1944, he had worked only four to five hours a day; that his work consisted of routine checking of reports from the traffic court; that he did not lift or move any of the ledgers used, his co-workers handling all duties requiring physical exertion even of a minor nature; that he was never rushed in his work, being given at all times plenty of time to accomplish his duties; that on returning home each afternoon he rested in bed for at least an hour under his doctor's orders; that in his home life he did nothing requiring physical exertion; and that he used street cars exclusively as his mode of conveyance since he was unable to walk up the stairs of the elevated lines (R. 57–58).

On the same day, there was filed in court a letter from Dr. Johannesen to one Walter C. Healy, in which Dr. Johannesen, in reply to a request as to whether Gayer's physical condition would permit him to undergo with safety

an examination by a court-appointed physician to determine whether he could safely be subjected to examination as a witness, stated that Gayer, on October 17, 1942, suffered coronary occlusion, otherwise known as a heart attack, which was so severe that he was revived only after three-quarters of an hour's artificial respiration by a pulmotor squad; that he remained at home in bed for two months, resuming work about January 10, 1943; that on February 8, 1943, the court (Judge Barnes) had instructed that Gayer not be subjected to any form of interrogation or excitement such as would be occasioned by bringing him into court as a witness; that this instruction was given after he (Johannesen) had replied in the affirmative to a direct question as to whether Gayer might be subject to a similar attack if he were subjected to interrogation; that Gayer continued to work at his job, with which he had been familiar for many years and which required no mental or physical strain, until early in May 1944, when he suffered a second coronary occlusion, necessitating his going to a hospital for 10 to 14 days, following which he stayed at home until August 1, 1944, when he resumed his occupation; that Gayer's last electrocardiograph, taken October 6, 1944, showed the presence of decided heart damage and coronary disease; that Gayer realized he might suffer a sudden fatal attack at any time, physical or

emotional strain being predisposing factors; that he continued to work because it was essential that he do so in order to earn a living and support his wife; that in the event of a third attack it would be necessary for him, if he survived, to remain in bed for several months; that death usually ensues after or during the third or fourth such attack; that to subject Gayer to a physical examination by a court-appointed physician to determine whether he could safely undergo examination as a witness would cause him emotional, mental, and physical strain comparable to being called actually as a witness; that in his opinion, due to Gayer's nervous and high strung nature, such an examination would jeopardize his life; and that in the event such an examination was ordered, he would be prepared to testify that the ordering of it was a direct contributing factor to any serious outcome thereof (R. 59–61).

On the same day (December 18, 1944), petitioner's motion was denied (R. 65).

Petitioner appealed to the circuit court of appeals both from the order denying subpoenas *duces tecum* addressed to the United States Attorney and the Attorney General and from the order refusing to appoint a physician to examine Gayer. The appealability of the orders was not controverted, but the court, on its own motion, dismissed the appeals for lack of juris-

diction on the ground that the orders were not final decisions within the meaning of Section 128 (a) of the Judicial Code (28 U. S. C. 225 (a)).

ARGUMENT

Pretermitting the question of the appealability of orders in proceedings to perpetuate testimony based apparently on Rule 27 of the Federal Rules of Civil Procedure (28 U. S. C. following 723c), and also the question of the availability of *coram nobis* (the foundational proceeding) in the federal courts, particularly where the attack is upon a sentence which has already been served, we submit that there can be no doubt that the district court did not abuse its discretion in making the orders in question. In respect of the order relating to the Attorney General and the United States Attorney, we think it plain from a reading of the various allegations of the motion (*supra,* pp. 6–10) that its vagueness and inconsistency justified the court in refusing to grant it.[3] Thus, it was alleged that Newman, Nora Newman, and Gayer had "several times testified before said prosecuting officials" to something concerning petitioner, but to just what was left undisclosed (*supra,* p. 8). Again, it was alleged that "at one of the conferences at the Office of the At-

[3] It may be pointed out that lack of specificity, as has been indicated (*supra*, p. 3), was the principal basis for the refusal of the circuit court of appeals to grant petitioner leave to file the *coram nobis* petition in the district court.

torney General of the United States" Newman had "again testified under oath" that petitioner was innocent, but that "the said assistant Attorney General of the United States" sought to induce him to "put the blame on" petitioner (*supra,* pp. 8–9). This was the first and only mention of any *assistant* Attorney General, all previous references having been to the United States Attorney for the Northern District of Illinois and the Attorney General. Nor was the name of the "assistant Attorney General" given. Again, while petitioner made various allegations as to testimony and statements having been made by and to various officials, he nowhere alleged that any such testimony or statements were ever recorded. Yet his motion requested that the United States Attorney and the Attorney General be directed "to produce" any and all documents and statements, sworn or unsworn, made by Newman, Nora Newman, Gayer, and Salitsky (*supra,* p. 7). Indeed, so far as Salitsky is concerned, the motion is even less revelatory than as to others with reference to the nature and substance of any statements he made to the prosecuting officials. Furthermore, it will be observed that the motion, in addition to requesting subpoenas *duces tecum* directing the United States Attorney and the Attorney General to produce documents, also requested that the "said officials' testimony be perpetuated" to support petitioner's application

to vacate his conviction on the ground that a conspiracy existed between "the said prosecuting officials" and Newman to bring about petitioner's conviction by perjured testimony. Presumably, the persons referred to as "the United States District Attorney for this District and the Attorney General of the United States" in that part of the motion requesting subpoenas *duces tecum* were the persons bearing those respective titles on June 18, 1943, the date of the motion, namely J. Albert Woll and Francis Biddle. Presumably, too, the persons referred to as "the said officials" in that part of the motion requesting permission to perpetuate "the said officials' testimony" were the same individuals. Obviously, the court was not required to grant leave to petitioner to interrogate them, since they did not occupy the offices of United States Attorney for the Northern District of Illinois and Attorney General of the United States, respectively, at the times the various statements "prior to June 1934," referred to by petitioner, were made. Without analyzing in greater detail the allegations of the motion, we think it is evident that the court, in its discretion, properly denied the motion.

In respect of the order refusing to appoint a physician to examine Gayer, we think it equally clear, in view of the circumstances (*supra,* pp. 10–13), that the court likewise properly exercised its discretion in denying the motion.

Moreover, attention is called to several factors which undermine the possibility that petitioner will ever be able to utilize *coram nobis,* in support of which the proceedings to perpetuate testimony were brought. While the circuit court of appeals did not base its opinion denying petitioner permission to file his application for the writ in the district court upon the ground that he had not been diligent, that opinion indicates that petitioner knew of the alleged conspiracy between the prosecuting officials and Newman as early as July 30, 1934 (129 F. 2d, at 22), the date of his conviction.[4] Also, the Department file indicates that petitioner made the alleged conspiracy the basis for a petition for a writ of habeas corpus which he filed in the Eastern District of Michigan on July 9, 1937, to secure his release from the United States Detention Farm at Milan, Michigan, where he was serving his sentence. Furthermore, in an opinion by the Circuit Court of Appeals for the Seventh Circuit rendered November 10, 1938 (101 F. 2d 341), relating to an appeal from petitioner's disbarment by the United States District Court for the Northern District of Illinois, reference is made (p. 342) to petitioner's answer to the disbarment petition to the effect "that his conviction in the criminal

[4] In his petition to perpetuate the testimony of Newman and Gayer it was alleged, however, that knowledge of the conspiracy came to petitioner "subsequent to the entry of the order of conviction on July 30, 1934" (R. 3).

case had been obtained as a result of perjury committed with the knowledge and consent of the prosecuting officials * * *." It is thus evident that considerably more than four years before petitioner filed his application in the circuit court of appeals for permission to apply to the district court for *coram nobis,* he was aware of the alleged conspiracy upon which he predicated his application. The applicant for relief by *coram nobis* must proceed with diligence (cf. *Bronson* v. *Schulten,* 104 U. S. 410, 417–418), and lack of diligence casts doubt upon the verity of his allegations (cf. *Hysler* v. *Florida,* 315 U. S. 411, 417, 422).

Additionally, the Department file indicates that petitioner's application for habeas corpus in Michigan in July, 1937, was denied after a hearing at which the merits of his claim were considered.[5] There is no mention of the habeas corpus proceeding in the opinion of the circuit court of appeals denying petitioner leave to proceed in the district court by *coram nobis.*

[5] This proceeding was apparently not reported. While there is reference in the Department file to an appeal from the order of denial, the file does not disclose whether an appeal was pressed or its result, and no reported decision covering the appeal has been found. Since the file indicates that petitioner was released from the Milan Detention Farm on or about November 13, 1937, the probability is that the case had become moot before it could be heard or decided by the circuit court of appeals.

CONCLUSION

The petition for a writ of certiorari does not, in our opinion, present any question requiring review by this Court. We therefore respectfully submit that it should be denied.

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